Mac Tools, Inc. *and* **John Schadle.** Case 9-CA-16351

16 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 22 September 1982 Administrative Law Judge David L. Evans issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

While we agree with the judge's findings that the Respondent has not, as alleged, violated Section 8(a)(3) of the Act by discharging employee John Schadle, or violated Section 8(a)(1) by the speech its manager of industrial relations Howard Christiansen made to employees on Schadle's unfair labor practice charge, we do so for the reasons that follow in addition to those set out in the judge's decision. Furthermore, we also adopt the 8(a)(1) violations which the judge found, but with certain qualifications as explained below.

Certain background evidence is important in order to put Schadle's discharge in proper prospective. Credited evidence shows that in December 1980, about a month before the discharge, employee Anthony Crawford observed Schadle yawning in the employee restroom. When Crawford asked how he was doing, Schadle replied that he was alright because he had just taken a nap. Schadle admitted making such statements to plant employees but passed them off as a joke. Crawford subsequently informed his department foreman, Darrell Williams, that he had heard rumors that Schadle was sleeping in the area of the plant in which the Respondent stored its cardboard boxes.[4] Williams told Crawford that he wanted to be informed if Crawford saw Schadle sleeping there, and Williams also told Assistant Department Foreman Linda Black what Crawford had said. Thereafter, on 13 January, Schadle was assigned to sweep the carton-storage area as part of his regular janitorial duties. About 3 or 4 minutes after the morning break, Crawford informed Black that another employee had told him that Schadle was probably sleeping back in the storage area. Black, after attempting unsuccessfully to find her supervisor, then proceeded to this remote area where she found Schadle sleeping in a prone position and secreted behind large stacks of cartons. Black observed Schadle sleeping for 35–40 seconds before she left the area. The judge found that Schadle slept for this time plus the time elapsed between Crawford's report to Black and Black's finding Schadle, a period of at least 5 minutes.[5] The next day, following an investigation during which Schadle was able to present his version of the incident, the Respondent discharged Schadle based on Black's accusation.

In finding that Schadle's discharge was not unlawful, the judge found that Schadle was indeed sleeping; that Manager of Industrial Relations Christiansen, who made the decision to discharge him, had asked others in management and was informed that discharge was the penalty for an employee caught sleeping; that five other employees had been caught sleeping and had been discharged; and that, when Christiansen decided to discharge Schadle, he was not aware that another employee caught sleeping on the job had "merely" been suspended. Counsel for the General Counsel argues in her exceptions, however, that the Respondent never would have discovered Schadle sleeping in the storage area but for its constant surveillance over his activities which was discriminately moti-

[1] Both the General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In his decision, the judge stated that employee John Schadle, the Respondent, and the General Counsel had reached a settlement agreement as to Schadle's alleged unlawful discharge providing for the posting of a notice and the payment of $13,000 to Schadle. The judge concluded that, apparently because of certain remarks the Respondent thereafter made in a speech to its employees concerning this matter, the Regional Director did not approve the proposed settlement. Upon reviewing the record, it appears that the Respondent and employee Schadle may have been planning to enter into a non-Board settlement of the dispute in which the Respondent would pay Schadle $13,000 in return for Schadle's withdrawing his unfair labor practice charge. However, we find no evidence that the Regional Director was a party to this settlement proposal or that he ever approved a request to withdraw the charge filed.

[3] The judge found, and we agree, that the Respondent violated Sec. 8(a)(1) of the Act by its supervisor's conduct in telling Schadle that there was a "general order" to get rid of him. However, he inadvertently failed to provide for an order requiring that the Respondent cease and desist from engaging in such unlawful conduct. Accordingly, we shall issue our customary order to remedy the violation found.

[4] Crawford had a legitimate reason for reporting the plant "rumors" to Williams. As a forklift operator, he frequently removed cartons from the storage area where Schadle subsequently was found sleeping. Thus, Crawford feared that Schadle would be injured if he continued his apparent practice of sleeping there.

[5] The General Counsel disputes this finding but relies on testimony which, while not specifically discussed by the judge, was implicitly discredited by his affirmative finding that Schadle slept at least 5 minutes.

vated. We find that the preponderance of the evidence clearly refutes the General Counsel's contention.[6] Here it is undisputed that union activities ceased at the Georgetown facility more than 3 months before Schadle's discharge. Furthermore, despite Crawford's earlier report of the rumors of Schadle's sleeping during work hours, the Respondent did not, thereafter, attempt to catch him sleeping as it certainly would have done if the General Counsel's theory of this case were correct. Indeed, Black credibly denied being instructed to look for Schadle when first told, in December, of the rumors that he was sleeping. Further, the record is devoid of evidence that any supervisor took pains to discover Schadle engaging in such misconduct until Black was given information that confirmed the earlier rumors. Thus, based on Crawford's report providing specific details as to Schadle's location in the storage area, Black had ample cause to investigate. Indeed, Black would have been derelict in her supervisory responsibilities if she had not checked out Crawford's information. More critically, Schadle had provided the Respondent with reason to look for him by instigating rumors that he was sleeping during work hours. Thus, it was Schadle's own so-called jesting remarks, not any surveillance of his activities, that first put the Respondent on notice of Schadle's dereliction and ultimately resulted in the Respondent's discovering him engaged in a dischargeable offense.

In addition, the General Counsel contends that the Respondent's investigation of this incident was done solely for the purpose of building a case against Schadle. The record shows, however, that the Respondent merely conducted the type of extensive investigation that most employers would have done under the circumstances. Thus, upon learning that Schadle had been found sleeping during working hours, Plant Manager Britain promptly contacted the divisional employment manager, Thomas Rayburn, concerning this matter. Rayburn instructed Britain to obtain Schadle's version of this incident. Pursuant to established company practice, Rayburn also directed that Schadle be suspended pending further investigation. Rayburn then called his superior, Christiansen, who was out of town that day. Since Christiansen had been on the job for only about 3 months, Rayburn was anxious to inform him of the situation before proceeding any further. Christiansen told Rayburn that he should visit the Georgetown facility in order to review the facts of the case with plant management. Thereafter, in conducting the investigation that led to Schadle's discharge, Rayburn took pictures of the area where Schadle was found asleep and obtained signed statements from several witnesses, including Black.

Contrary to the General Counsel, we find that the procedures the Respondent followed were principally designed to protect the employee's interest. It is significant here that, given the severity of Schadle's misconduct, the Respondent had legitimate grounds for terminating Schadle on the spot. Instead, Schadle was given full opportunity, as noted, to refute Black's accusation. Moreover, even assuming that the Respondent was to some extent preparing for a possible unfair labor practice charge when it conducted its investigation here, it is clear that such evidence would not warrant the finding of a violation.

The General Counsel also claims that Schadle was the victim of disparate treatment in that the Respondent would not have imposed the same discipline in the absence of his union activities. She relies on an incident where the Respondent suspended, but did not discharge, security guard Richard Newman because he fell asleep while waiting

[6] The judge found that the Respondent repeatedly had informed Schadle and other employees that Schadle was under surveillance. Since the evidence shows that the employees who heard these statements clearly understood that the reason for the Respondent's surveillance was Schadle's union activities, we adopt the judge's findings that such conduct was unlawful in those instances where a violation was alleged. We reject, however, his conclusion that these remarks also establish that the Respondent was seeking to discharge Schadle for his union activities. Thus, aside from Supervisor Dale's remark to Schadle that there was a "general order" to get rid of him, the record contains no evidence of the Respondent's desire to terminate Schadle. In reaching this conclusion, we have noted employee Collins' testimony that Supervisor Jacobs "told me that he had told Mr. Schadle that he better watch his step because the management was looking for a reason to get him into some trouble." The judge made no credibility resolutions concerning this testimony because he found that Jacobs essentially had admitted making this statement to Collins. A reading of the record discloses, however, that Jacobs only testified that he told Collins that the Respondent had been watching Schadle. While it is clear that in one instance the judge discredited Jacobs' testimony denying certain other remarks attributed to him by employee Gary Rickey, we are satisfied that the judge's credibility finding applied only to that particular conversation. Thus, in the absence of any credibility resolution as to the conflict in testimony between Collins and Jacobs regarding their conversation, we do not find that Jacob's alleged statement is an admission that the Respondent wanted to terminate Schadle.

Although Member Dennis agrees with the dismissal of the 8(a)(3) and (1) allegations concerning John Schadle's discharge, she disagrees with the reversal of the judge's finding that the Respondent was looking for a reason to discharge Schadle. Notwithstanding the judge's failure to make a specific credibility resolution concerning Supervisor Jacobs' alleged remark to employee Collins, there is other evidence sufficient to support the judge's conclusion (including Supervisor Dale's remark to Schadle that there was a "general order" to get rid of him). In Member Dennis' view, the judge was correct when he said "Respondent was looking for a reason to discharge Schadle. . . . [and] Schadle handed Respondent a reason to discharge him." The judge properly relied on *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966):

> The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

to open a plant gate for the first shift. However, the judge discounted this incident because he found no evidence that any member of management who was involved in Schadle's discharge was aware that Newman had received less discipline. Alternatively, as the judge found, there is a difference between an employee who dozes off on completing his security rounds on the night shift and shortly before his shift is to end, and one, like Schadle, who deliberately and surreptitiously leaves his work station to take a nap during work hours.

The record further shows that, aside from the Newman case, the Respondent has an established practice of discharging employees found sleeping on worktime. Before Schadle's discharge, the Respondent had terminated five employees in the previous 7 years for engaging in such misconduct.[7] One of these discharges occurred, in fact, only a week before Schadle was found sleeping. In view of the Respondent's record in this regard and the seriousness of Schadle's misconduct, we agree with the judge that the evidence is insufficient to establish disparate treatment here.

In sum, for the above reasons and those noted by the judge, we adopt his finding that the Respondent has met its burden under *Wright Line*, 251 NLRB 1083 (1980), of proving that Schadle would have been discharged regardless of his union activities. Accordingly, we shall dismiss this allegation of the complaint.

We also find no violation in the speech that the Respondent delivered to its employees concerning the possible settlement of this dispute. The text of this speech, as set forth in the judge's decision, contains neither threats nor promises. The Respondent merely announced to its employees the terms of a settlement agreement it believed would resolve Schadle's unfair labor practice charge. In doing so, the Respondent emphasized that, although Schadle had been discharged for cause, it would pay him a large sum of money to avoid the greater expense of continuing litigation. There is no evidence that its description was inaccurate. Accordingly, we also adopt the judge's finding that the speech was lawful.

[7] Although these discharges occurred at other plants that the Respondent operates in Ohio, the record shows that the Respondent has similar labor relations policies for all area plants, including the Georgetown facility, administered by its industrial relations department based in Washington Court House, Ohio. There is no showing in this case that, except for the Newman incident, the Respondent did not uniformly apply its policy of discharging employees found sleeping on worktime to all employees at area plants. Thus, in considering this issue of disparate treatment, it is immaterial that previous discharges for this offense involved plants other than the one where Schadle worked and that three of the employees found sleeping, like Newman, were security guards.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mac Tools, Inc., Georgetown, Ohio, it officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraph accordingly.

"(d) Informing employees that there is a general order to get rid of them in order to discourage their union activities."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT solicit grievances from employees and promise adjustment of such grievances in order to discourage employees' support for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other union.

WE WILL NOT create an impression among employees that their union activities have been under surveillance.

WE WILL NOT inform employees that they or other employees are being watched by us in order to discourage any employee's union activity.

WE WILL NOT inform our employees that there is a general order to get rid of them in order to discourage their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MAC TOOLS, INC.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case was tried before me on February 1-5 and March 15, 1982. The charge was filed by John Schadle, an individual, on January 21, 1981. The complaint was issued against Mac Tools, Inc. (the Respondent), alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by the discharge of Schadle, by

the issuance of a written warning notice to employee Thomas Howland, and by other acts and conduct. The complaint was further amended at the trial. Respondent filed answers denying violations of the Act but admitting jurisdiction. After the hearing the General Counsel and Respondent submitted briefs which have been duly considered.

On the entire record in this proceeding, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a division of the Stanley Works, is an Ohio corporation engaged in the manufacture of toolboxes at Georgetown, Ohio. During the 12 months preceding the issuance of the complaint herein, Respondent purchased and received at its Georgetown facilities goods and materials valued in excess of $50,000 directly from suppliers located in points outside the State of Ohio. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent has four facilities in Ohio: A distribution center in Columbus and plants in Washington Court House, Sabina, and Georgetown. At the Georgetown plant at the time of the events in question, the plant superintendent was Larry Britain; assistant plant superintendent was Kenneth Beal; night production general foreman was Lamar Dale; reporting to Dale were Foremen Tom (Jake) Jacobs and Kenneth Wedmore; day general foreman was Joe Kirk; reporting to Kirk were Foremen Owen Cornwell and Darrell Williams; reporting to Williams was Assistant Foreman Linda Black. Respondent's personnel and security department was under the direction of Howard Christiansen, manager of industrial relations whose office is in Washington Court House. Christiansen succeeded Phil Brewer to this post in October 1980. Reporting to Christiansen were personnel managers at Respondent's Sabina and Georgetown facilities; at the Georgetown facility the personnel supervisor was Mike Bellis. Also reporting to Christiansen was Walker Hockett, safety and security supervisor; reporting to Hockett were "Security leaders" and guards at the facilities; John Martin was the security leader at the Georgetown facility at relevant times herein. John Eary was the foreman of the custodians at Georgetown; Larry Fischer was the maintenance foreman. It is undisputed that the foregoing named individuals were, at the time of the events described herein, supervisors within the meaning of Section 2(11) of the Act.

Respondent's production operation at Georgetown is conducted on two shifts, the first from 7 a.m. to 3:30 p.m.; the second from 4 p.m. to 12:30 a.m. On September 15, 1980,[1] John Schadle and Tom Howland were employed as machine operators on the second shift. On that date, pursuant to arrangements made by Schadle, Schadle and Howland met with Ivory Howard, a union representative, in the parking lot of a local restaurant. Howard gave them union authorization cards to distribute among Respondent's employees. The next day Howland took the cards to the plant and began soliciting signatures. Schadle was on excused absence for the 3 or 4 days after the meeting with Howard, and Howland gave all the cards to Schadle when the latter returned. Schadle first solicited among the second-shift employees. Then on September 24, he passed out cards to the first-shift employees between 3:30 and 4 p.m. at the shift change period. Schadle testified that he conducted this activity in a parking lot adjacent to one door of the plant and the activity took from 10 to 15 minutes. Schadle testified that during this period Beal stood in a door next to the employee entrance. Also, according to the testimony of Schadle, Britain and Fischer walked through the employee entrance and "proceeded on around to look at something on the building." Schadle testified that Britain walked close enough to reach out and touch him and that Britain did give Schadle a perfunctory greeting. Schadle further testified that during this time Beal remained at a distance about 20 feet from where the cards were being distributed.[2]

There had been two prior organizational attempts in Respondent's Georgetown plant during the preceding 5 years. Schadle's parking lot activity apparently was the first knowledge to Respondent of another such attempt. Dale, who had been discharged by Respondent by the time of the hearing, testified on behalf of the General Counsel. Dale testified that when Schadle's activity began he and other supervisors were called to Britain's office where they were instructed to keep their eyes and ears open. Dale testified that he talked to several employees whom he believed to be opposed to the Union, being careful not to question any of them.[3] Dale credibly testified that after he talked to several employees he reported to Britain that the activity was very widespread.

After Dale's report to Britain, a meeting among Beal and Britain and Schadle and Howland was held. Dale and Howland testified for the General Counsel about how the meeting, which Dale did not attend, was arranged. On the basis of their creditable testimony,[4] I

[1] Unless otherwise specified all dates hereafter are between September 15, 1980, and November 18, 1981.

[2] The complaint does not allege that this conduct of Britain, Beal, and Fischer violated Sec. 8(a)(1) of the Act.

[3] The complaint alleges that about September 22 Dale interrogated employees. On the basis of Dale's testimony, and the testimony of employee Jerry David Daughtery, another witness called by the General Counsel, who also testified that he volunteered information to Dale, I find that this allegation is without merit and recommend its dismissal.

[4] Beal and Britain testified, but not about this meeting, nor how it was arranged.

find[5] that during the second shift on September 25, Beal and Britain were in the plant area, an unusual occurrence. Howland had noticed Beal and Britain and stopped Dale to ask what was going on. The two men discussed the union activity, Howland mentioning that the employees were not serious about securing recognition of a labor organization but were only trying to better their working conditions. Dale told Howland that Britain and Beal would like to talk to Schadle and Howland about the matter and, if Howland agreed, Dale would have Beal walk through the plant so that Howland could stop Beal and suggest a meeting. Howland agreed. Dale went to the office after talking to Howland and told Beal and Britain that the authorization cards had not been turned into the Union and that Schadle and Howland "were requesting a meeting of sorts in order to be able to discuss the problems." In about an hour, Beal did walk through the production area near Howland's machine. Howland stopped Beal and asked what he thought of the "unrest" in the plant. Beal stated that he and Britain wanted to talk to Schadle and Howland about the matter either in the production area or in the office. Howland suggested that they go to the office. Beal agreed and stated that he would tell Howland's foreman that Howland would be away from the production area for a while. Howland turned off his machine and got Schadle and the two employees went to the office to meet with Britain and Beal.

The meeting started by Beal telling Britain that Howland and Schadle had come forward to discuss the "unrest" in the plant. Britain asked Schadle and Howland what, in their personal opinions, was wrong in the plant to be causing the unrest. Schadle and Howland told the supervisor that although they could not speak for the entire employee complement they felt that Respondent had an inconsistent absentee policy; the employees did not like the antinepotism policy and the lack of a retirement plan. Specifically, Howland testified that he and Schadle complained that "they just kept saying [the retirement plan] was in the works." Schadle testified that he also said that things would run more smoothly at the plant if someone other than Phil Brewer were the personnel supervisor.

Schadle further testified that Britain replied "that he didn't know what could be done, that he would have to check into it." The men shook hands at the termination of the meeting and while doing so, Beal asked Schadle if he still had the cards. Schadle testified that he replied that he did and Beal "asked if I could hold the cards until they had—Mr. Britain and [he] had the meeting in Washington Court House to see what could be worked out." Howland's testimony differs only slightly from Schadle on this point. According to Howland:

> [T]hey told us how at Washington Court House, they didn't understand the problems they were having, and that they couldn't get Washington Court House to listen to what they had to say, and that if me and John would hold up on what we was doing, that they would go back to the Courthouse and see what they could do for us. And, Ken Beal asked us if we'd play ball with him.

Schadle replied that he would hold the cards until the following Thursday when there was a scheduled employee meeting and that if any employees asked to have their cards returned he would do so, but would not turn the cards over to a supervisor.

On cross-examination Howland was asked and testified:

> Q. Were you promised anything during that meeting?
>
> A. Just that they'd go to Washington Court House, and see what they could find out. They couldn't guarantee nothing.

The complaint alleges that in this meeting Britain and Beal "solicited grievances from employees and promised adjustment of such grievances in order to discourage employees' support of the Union." Respondent leans heavily on the facts that the word "union" was not mentioned during the meeting, and that Howland agreed that there was no express promise to remedy the grievances aired at the meeting. On these factors, Respondent argues that there was no element of interference, restraint, or coercion in the actions of Britain and Beal. I disagree. While there was no express reference to the Union, the meeting was held solely because the employees had engaged in union activity and everyone there knew it. Although the employees were told that Britain and Beal could not *guarantee* anything, they were certainly promised something; that local management would present their grievances to corporate headquarters in Washington Court House. This type of promise is one reasonably calculated to cause employees to suspend their statutorily protected activity while the grievances were being presented to higher management, if not abandon them all together. Therefore an element of interference would be presumed. But, in case Schadle had missed the point, Beal specifically asked him not to mail the authorization cards until the grievances could be taken to Washington Court House and management there had an opportunity to respond, and Schadle agreed. Thus, this is a case of actual interference with Schadle's Section 7 right to transmit the authorization cards to the Union.

Therefore the General Counsel has proved the elements of solicitation of grievances coupled with a promise of attempted remedy, in violation of Section 8(a)(1) of the Act, and I so find and conclude.

About October 1, Beal and Britain conducted meetings with the employees.[6] At the meeting he attended, Schadle testified that Beal announced a 40-cent-per-hour wage increase effective sometime in October and another 40 cents effective the following April; increased insurance coverage in the death and dismemberment policy; disability pay increase from $65 to $75; and night-shift

[5] Respondent contends that the testimony of Dale and Howland is fatally inconsistent on different aspects of how the meeting was arranged; I disagree.

[6] Apparently this was the meeting to which Schadle referred on September 25.

premium increase from 5 to 15 cents per hour; a new posting and bidding system for job transfers in place of the then existing one. The employees were further told that Respondent was still working on its retirement program. In their testimony, neither Britain nor Beal discussed this employee meeting and Schadle's testimony, which I find creditable, stands undenied. The complaint alleges that the announcement of benefits by Respondent constitutes promises in violation of Section 8(a)(1); it does not allege that the subsequent grant of the benefits was a violation. Respondent adduced abundant evidence that all of the announced changes were scheduled prior to any union activity herein. The General Counsel does not contest this evidence but argues that, since Respondent usually announced changes by posting, "[t]he clear implication of the employees' meeting so close on the heels of Britain's and Beal's solicitation of grievances described above is that Respondent intended to convey that it had acted on those grievances (thereby obviating the need for another [sic] agent), and is the basis for paragraph 5(c) in the amended complaint."[7]

In making this argument the General Counsel appears to concede that had Respondent made its announcement of (nonviolative) benefits by posting, there would have been no violation. Thus, the General Counsel attacks only the form of the announcement, not the content. In making this argument the General Counsel cites no authority for the proposition that the form of the announcement determines its legal validity. I decline to attempt the establishment of such authority and shall recommend dismissal of this allegation of the complaint.

Howland's Warning Notice

On October 13, Night-Shift Foreman Wedmore gave Howland a written warning notice, an action the General Counsel contends to have been in violation of Section 8(a)(3). To put the event in perspective, it is to be noted that Howland and Wedmore had a bad relationship. Wedmore testified that before October 13 he was twice notified by his superiors that Howland had claimed that he was incompetent. (Howland put the number of such complaints at three.) Howland acknowledged that he had a poor opinion of Wedmore as a supervisor and admitted sending Respondent a "Thank You" card when, in February 1981, Wedmore was permanently transferred to the day shift.

Before the week of October 13, Howland placed a lock on a toolbox which was owned by Respondent. In the toolbox had been tools owned by both Respondent and Howland personally. According to Howland the reason he placed the lock on the toolbox was, "several times Kenny [Wedmore] got in my toolbox and he left tools out, took out tools I never found again, that I had to replace myself." Further according to Howland he was told by one Tom Reese, whom Howland described as "in charge on manufacturing at that time," that Respondent would provide Howland with a toolbox for the tools he owned and the company-owned tools should be returned to Lamar Dale.

[7] G.C. Br., p. 2.

The second-shift employees are required to turn in production cards at the supervisor's office at 12:25 a.m. At this time on October 13, Howland also took the company-owned wrenches to the office. Gathered there were Jacobs and several employees, including Schadle. According to Howland's own testimony:

> So, I took them and laid them on his desk, and Kenny Wedmore was in there. And, I set the box of Allen wrenches and screwdrivers down, and I had the boxed-end wrenches on a wire, and I laid them on the desk. And as I was going out, Jake Jacobs was there, and Kenny, and I told Kenny, I said there's all the tools you need to make the setups, I said, all you lack now is the knowledge. And he said, I got the knowledge. I said like hell you do. And I went out and washed up and punched out and went home.

In describing the event, Schadle characterized Howland's tone of voice as "disgusted."

October 10 was a Friday, on the following Monday, October 13, Wedmore issued the warning notice in question. As the "detail of occurrence" he described the exchange between Howland and himself essentially as Howland did in the testimony quoted above. As "immediate action, if any, taken by supervisor" Wedmore wrote: "Written warning for using abusive language toward his supervisor." In a written response to the warning Howland complained that he should not be penalized for using the word "hell" because other employees had used stronger language and that other employees had done as much as calling a supervisor a "damn liar" without penalty. Howland further complained that the only reason he could adduce for the warning notice was that he had passed out UAW membership cards in the preceding few weeks. Howland further stated:

> The fact that I was written up [was] because I told my foreman that he did not know what he was doing in [the] way of setting up a punch press. [It] was [based] on the fact that in the past when I was off, he set them up wrong and he does not know what dies to use for some jobs.

In other words, Howland meant what he said when he told Wedmore, in front of the group, that he did not know how to set up the machine. This being the case, I am confident that Howland employed a tone of voice that would have conveyed his seriousness when he insulted Wedmore.

The General Counsel does argue that Howland's remark was anything other than abusive. However, the General Counsel makes several contentions in an attempt to prove that the issuance of the warning notice was a violation of Section 8(a)(3):

1. The General Counsel contends that an admission made by Dale demonstrates discriminatory intent.

Howland testified "a couple of days" after he received the warning notice that he had a conversation with Dale when the two men were alone in the foreman's office. According to Howland:

> After we'd passed out the cards, there was things happening, and I asked Mr. Dale if—in the office, if they was mad at us after we passed out the cards. This was after I received the written warning and Mr. Dale told me that the Company really wasn't mad because I'd argued with the foreman or Mr. Brewer,[8] who was personnel manager at the time, but they was very upset because that we passed—sent the cards into the Union and that they thought that they was doing things to improve things at the Company.

Dale, who had been discharged by Respondent, testified for the General Counsel and appeared more than eager to do so. However, when asked on direct examination if he had any conversation with Howland about his union activity, other than the conversation resulting in the meeting among Howland, Schadle, Beal, and Britain, he testified only to one. This one, according to Dale, occurred on the production floor some 2 weeks *after* John Schadle transferred to first shift. Schadle, it was stipulated, transferred to the first shift on October 20. Also the content was different; no mention was made of an argument with a foreman (or Brewer). Because of the total failure of corroboration by Dale of Howland's testimony on the point, there is too much doubt in my mind about the matter to credit Howland's testimony. Moreover, even crediting Howland's account, there is no evidence of an admission by Dale that the warning notice was discriminatory. According to Howland's testimony, Dale was apparently referring to some argument with "the foreman or Mr. Brewer" when he told Howland what Respondent was *not* "mad" about. The circumstance which was the topic of the warning notice did not involve an argument with anyone; Howland made his insult to Wedmore, then turned heel, and left.

2. The General Counsel contends that Jacobs admitted the incident did not warrant discipline.

Howland testified that, at some point after October 13, Jacobs (Wedmore's night-shift coforeman) told him that Wedmore was going to do nothing about the incident until instructed to do so by Joe Kirk, day-shift general foreman. Jacobs testified for Respondent, but did not deny making the remark to Howland. However, Kirk and Wedmore credibly denied that Kirk had anything to do with the issuance of the warning notice and the remark by Jacobs appears to be nothing but speculation. In addition, the General Counsel's witness Dale testified that he discussed the matter with Kirk on October 13 and that Kirk "[t]hought it was terrible, and that Tom [Howland] should not get away with it without some kind retribution—not retribution, punish or whatever." Therefore, even if Kirk prevailed upon Wedmore to issue the warning notice, the cause was the obstreperous conduct of Howland, not his union or protected concerted activity.

3. The General Counsel contends that other employees had "snapped at or used harsh words towards their supervisor" without being similarly disciplined.

The General Counsel adduced testimony that employees had told their supervisor that they were "full of shit" and such. I credit all of this testimony which need not be repeated verbatim. But Howland was not disciplined for use of the word "hell" as the General Counsel argues. He was disciplined for verbally abusing his foreman. The employment of the term "abusive language" by Wedmore clearly conveys this import. Certainly, the warning notice did not state as a basis "cursing," which the General Counsel argues to be the gravamen of the warning.

Conclusion on Howland's Warning Notice

In a tone of "disgust," as Schadle characterized Howland's utterances, Wedmore was told that he was incompetent; he was further told this in front of five or six employees and Wedmore's coforeman Jacobs. When Wedmore protested that he did have the knowledge to use the wrenches, Howland, as he turned heel and walked out the door repeated the insult, saying "like hell you do."

A supervisor can be told he does not know what he is doing, or even that he is "full of shit" without humiliating him.[9] It depends on the circumstances. The General Counsel's witness Dale testified that he entered the office immediately after Howland had left and he found Wedmore there in an extremely upset condition. Therefore, it appears that the circumstances[10] of Howland's remark as well as the remark itself caused the upset in Wedmore.

The General Counsel advances the conclusion that the remark by Howland was "innocuous"; however, it is not for the Board to substitute its sense of insult for that of Respondent's foremen. It is clear to me, especially after hearing the testimony of Wedmore, as well as that of Dale on this point, that the upset created by Howland's insult was the sole cause of the October 13 warning notice and it was not in any part motivated by a desire to inflict punishment for Howland's protected union activity.

Therefore, I shall recommend dismissal of the allegation that the October 13 warning notice was issued to Howland in violation of Section 8(a)(3) of the Act.[11]

Treatment of Schadle

As previously mentioned, on October 20, Schadle transferred to the first shift. The voluntary transfer involved a demotion from press setup to janitor under the supervision of Foreman John Eary.[12] The complaint alleges that after this transfer Respondent imposed on Schadle more onerous working conditions by prohibiting from him talking to other employees. In support of this

[8] The reference to Brewer is unexplained in this record.

[9] Also, as Howland had done two or three times before without penalty, failings in a supervisor can be reported to higher management.

[10] These circumstances include the longstanding contempt Howland held for Wedmore which was assuredly known to those employees who witnessed the insult.

[11] I do not agree that the General Counsel had proved a case of discriminatory treatment because employee Mary Eary was given only a "verbal" written warning notice for certain remarks directed at Wedmore. Although loud and profane, the remarks by Eary, as related by the General Counsel's witnesses, were not calculated to humiliate Wedmore, the clear intent of Howland.

[12] Eary did not testify.

allegation, the General Counsel relies on the following testimony[13] of Schadle on direct examination:

> Q. Now after you got on first shift and were working under Mr. Eary, did he issue any instructions or give any restrictions to you around the plant?
>
> A. Yes. After I have been there just a few days, he advised me that I was not to carry on any type of conversation with other employees; that I had a job to do and they had a job to do. And when I asked him if he meant like to interrupt their work or hold them up from doing their duties, he said he didn't think it would be to my best interest to have very much of a conversation with any of them.
>
> Q. Now did he tell you this more than once?
>
> A. He didn't tell me that way more than once. He gave me—he called them "unofficial warnings" about my conversations with different people or about talking to people on several occasions.

When asked how long he had been talking to other employees, Schadle responded:

> At times, it would be a period of a minute. I can't recall interrupting anyone from their job for over a minute. There were times when maybe a person had a machine breakdown or were standing waiting on a set-up and I would also be working in that area, maybe sweeping, and we would converse for maybe two or three minutes. It was nothing out of the ordinary and it was nothing to hold up production. At other times, maybe it was just a general, "good morning. How are you doing this morning?" and Mr. Eary would come out and tell me that someone called him and said that I was holding up the work force.

Respondent introduced nine written warnings (some of them denominated "verbal") given to other employees. As stated by one warning:

> Talked to [employee named] about excessive talking. I told her that a few sentences were no problem but lengthy conversations were out of the question. I informed her that it was a verbal warning.

Except for the fact that Schadle was given no documented warning, there is no difference in the direction given this other employee and that given Schadle. Moreover, by his own admission, Schadle sometimes interrupted employees at their work, although he attempted to limit the interruption to a duration of no more than a minute. The other occasions alluded to by Schadle involving being spoken to by Eary because he had given a perfunctory greeting also contained no element of warning or evidence that Schadle was subjected to discriminatory treatment. Also, the testimony of Schadle about other instances of Eary's directions are too imprecise to make a factual finding.

Since the General Counsel has failed to prove that Schadle was subjected to discriminatory treatment, or that his work was made more onerous than that of other employees, or that he was subjected to rules to which other employees were not subjected, I find and conclude that the General Counsel has failed to prove this allegation of the complaint and I shall recommend that it be dismissed.

Animus Against Schadle

Schadle testified that approximately 2 weeks after he passed out union authorization cards (a point which would have been before he transferred to the second shift) he was working in the shear area when he was approached by Foreman Jacobs who had been his friend for over 20 years. According to Schadle, after the men discussed personal matters Jacobs parted saying:

> [H]e said he wanted to give me a little warning—just to take it like from one friend to another—that I was being watched and I should be very careful in what I said or did and who I said or did it to or in front of.

Jacobs acknowledged that he had given a warning to Schadle. Although he placed it in a different area in the plant, and after Schadle transferred to the second shift, it is clear to me that the two witnesses were talking about the same conversation. Jacobs testified that he told Schadle: "We had been friends for some time, and I said, you know, 'I think you should be careful. You're being watched.'" Jacobs testified that he gave this warning to Schadle after he inadvertently heard Kirk tell Cornwell "he should keep an eye on Johnny because, you know, he had seen Johnny stopping and talking to different people . . . stopping at their work areas and talking to other employees, and to keep an eye on him." Kirk denied giving any such instruction to any of his subordinates, such as Cornwell, and Cornwell testified that he did not remember such instruction from Kirk. Neither Schadle nor Jacobs testified that any reference was made to Schadle's union activity, and Jacobs denied that there was any reference to Schadle's union activity when he overheard Kirk giving instructions to Cornwell. However, this does not end the inquiry. Schadle had not been indulging in conversations to the extent that he had been issued a warning notice, as had other employees. Therefore, both Schadle and Jacobs knew that Jacobs was not talking about potential interference with production. The only salient aspect of Schadle's employment at the time was his spearheading of the union activity, and this was assuredly the cause for the warning that he was being watched.[14] Nor can Respondent take refuge in the fact

[13] The General Counsel also advanced some evidence that, for a time, Schadle was told not to clean in a painting area. The General Counsel does not mention this testimony in her brief presumably because she would agree with me that there is insufficient credible evidence that such instruction was an imposition of more onerous working conditions on Schadle.

[14] Jacobs' testimony that his warning stemmed from instructions he inadvertently heard Kirk give Cornwell was false; aside from the fact that I got the distinct impression that Jacobs was concocting the overheard conversation as he went along, Kirk denied giving and Cornwell denied remembering such instruction.

that Schadle and Jacobs were longstanding friends. First of all, friendship in the abstract has never been approved by the Board or the courts as an absolute defense to 8(a)(1) allegations; supervisors can, and do, from good intentions or bad, trample upon the Section 7 rights of employee friends. But more importantly the warning by Jacobs was a statement of fact specifically calculated to interfere with Schadle's union activity, not a generalized expression of opinion of possible companywide response to union activity which was before the Board in the case cited by Respondent, *Mobil Oil Corp.*, 219 NLRB 511 (1975).

I find and conclude that, as alleged, Jacobs' warning to Schadle that he was being watched violated Section 8(a)(1) of the Act. I further conclude that Jacobs' remarks were an admission that Respondent was seeking to rid itself of Schadle because of his activities on behalf of the Union.

The General Counsel also introduced evidence that Schadle was being watched after his transfer to the first shift. Lamar Dale testified that within a week after Schadle was transferred he had a conversation with Beal. According to Dale:

> In just a normal conversation with Mr. Beal at change of shifts or in the second shift, we were talking about what seemed to be the ridiculousness of Mr. Schadle down bidding and taking a dollar an hour cut in pay, and during the conversation Mr. Beal said that was all right. You know, he could not understand it either, but that was all right. That John was on first shift now, and that he could pretty much be more closely scrutinized [and] his activities on the floor could be watched more carefully, and that if he blundered there would be people around to see it . . . [and that] management and supervision were going to make sure that John would not further his union activities on [first] shift. They were going to, pretty much, keep him busy and away from as many employees as possible being as he took up a general maintenance job which meant sweeping and being sent wherever he was to be sent.

On direct examination Dale further testified that he, in turn, told Schadle:

> . . . for his sake he had better walk softly, be careful, because he was in touchy territory. That he was on first shift and that he wanted to keep his job and support his family he'd better be careful of what he was doing. That he was definitely being watched, so that he made any mistakes he would suffer them.

On cross-examination Dale added that he told Schadle that he was being watched because of his union activities. In Dale's pretrial affidavit, Dale covers his warning to Schadle, but includes no mention of his categorically telling Schadle that he was being watched because of his union activities. Dale was unable to satisfactorily explain the omission. Schadle did not testify that Dale gave him the dramatic "family sake . . . walk softly . . . touchy territory" warning described by Dale. Schadle only testified that Dale stated that there was a "general order" to get rid of him, and, on cross-examination, specifically denied that Dale told him that it was because of his union activity. I find that Dale, who had been discharged by Respondent and was eager to testify for the General Counsel, embellished both Beal's statement to him[15] and his statement to Schadle, and I discredit Dale's testimony accordingly. However, I found Schadle credible in his testimony that Dale warned him that there was a "general order" to get rid of him, and I conclude that the warning was a violation of Section 8(a)(1), as well as evidence that Respondent desired to be rid of Schadle because of his union activity.

Employee Marvel Waulk testified that about 2 weeks after Schadle's transfer to the first shift on October 20 he had a conversation at the plant with Schadle's supervisor John Eary. During the conversation, according to Waulk, Eary stated "that John was being watched and he had—he's had to get on him. He had to get on him at times. He really didn't want to, but he was told to. But he didn't say by who." Waulk acknowledged on cross-examination that express reference to the Union was not made by Eary. Eary did not testify, and I found Waulk to be credible. The complaint alleges that Eary's statement to Waulk is a violation of Section 8(a)(1). I agree. Although no express reference to the Union was made, there is no other salient aspect of Schadle's employment which could have been the subject of Eary's remark. That Eary's remark bears a coercive element cannot be denied. Eary was, in effect, telling Waulk that although Schadle was a competent employee he had instructions to reprimand, or otherwise discipline, Schadle for invalid reasons. In this circumstance I find that such remarks would tend to restrain and coerce employees in the exercise of their Section 7 rights, and thus a violation of Section 8(a)(1) is made out. I further find that Eary's remark is an admission by Respondent's supervisor, and therefore agent, that Schadle "was being watched." Again there is no reasonable doubt that Eary was referring to Schadle's union activity. As noted, there was nothing else unusual in Schadle's employment tenure which would have caused such a remark; if, as Respondent might argue, Eary's remark could possibly indicate that Schadle was being watched because he was not performing his duties or gossiping with other employees, it is to be noted that there is no evidence that Schadle failed to perform his janitorial chores adequately after transferring to first shift, and, if he had been guilty of excessive talking, he assuredly would have received a warning notice such as those issued to other employees as mentioned above.

Employee Collins testified that about 4 weeks after Schadle's discharge Supervisor Jacobs "told me that he had told Mr. Schadle that he better watch his step because the management was looking for a reason to get him into some trouble." Jacobs essentially admitted this statement to Collins. Although this statement is not alleged to be a violation of Section 8(a)(1), it substantiates

[15] I do not rely on Beal's denial which was in response to a question that was overly narrow, as well as blatantly leading.

the conclusion that Respondent was seeking a reason to discharge Schadle, and I find, again, it was because of Schadle's union activity.

Employee Gary Robert Rickey testified that a few weeks before the trial of this matter Jacobs told him he had warned Schadle that "Mac Tool management was watching him and that he was a friend of Johnny's and that he would have—he had told him to watch. [sic] Because they were watching him." On cross-examination Rickey was asked if Jacobs had said why Schadle was being watched. Rickey replied: "[T]hey figured he was after a union." Jacobs was asked on direct examination if he had made such a statement to Rickey. Jacobs first stated that he could not remember. After obviously being alerted by a colloquy with me initiated by Respondent's counsel, Jacobs then flatly denied having made such a statement. I found Rickey to be a completely credible witness and I believe, as he testified, that he did, in fact, remember Jacobs' specific reference to the Union on cross-examination although he did not remember it while on direct. Conversely, I found Jacobs to be a dissembling witness; he was a personal friend of Schadle; he was trying to toe the fine line between his friendship with Schadle and some concept of responsibility owed to Respondent as one of its supervisors. Although not alleged as an independent violation the remark by Jacobs to Rickey is a clear admission that Respondent was seeking to discharge Schadle for his union activity.

Howland testified that sometime before Christmas, when employee Marvel Waulk was present, he met Jacobs at a tavern. According to Howland the three men were discussing union cards and Jacobs said "that they was just watching Johnny and myself." Jacobs admitted this statement, which was made the subject of a motion to amend the complaint at the trial. The General Counsel alleges that the statement by Jacobs constitutes the creation of the impression of surveillance of union activities. I agree and find and conclude that by such conduct Respondent violated Section 8(a)(1) of the Act. I further find the remark to be another admission that Respondent was seeking a basis for discharge of Schadle for his union activity.

Discharge of Schadle

On January 14 Schadle was discharged by Respondent. The General Counsel contends that this action was caused by Schadle's union activity; Respondent contends that it was solely because he was found sleeping when he should have been working.

After Schadle transferred to the first shift, one of his duties was to sweep out storage areas. One of those areas was a large open space where cardboard cartons were stored. The cartons were of various sizes; they were flattened and bound in bundles which were stacked in heights varying from 1 to 12 feet. These bundles were moved in and out of the storage area by utilization of a forklift. When new bundles were brought in, or "old" ones were removed by forklift, dust from the cardboard was generated and, of course, fell about the area. On the day shift, at the time in question, the forklift operator was Anthony Dale Crawford who was assigned to the assembly department. Crawford immediately reported to Linda Black, assistant foreman, and Black immediately reported to Darrell Williams, department foreman.

Crawford credibly testified that 2 to 4 weeks before Christmas he met John Schadle in the employee restroom. Schadle had a broom in his hand and was yawning. Crawford asked Schadle how he was doing and Schadle replied that he was all right because he had just had a nap. Crawford, on cross-examination, acknowledged that Schadle was laughing when he admitted to the nap and the remark could have been just after break. On cross-examination, Schadle stated that he made such statements to other employees but only as a joke.

Crawford further credibly testified that during the week before Christmas he told Williams that he had heard rumors that Schadle was sleeping in the carton storage area. Williams replied to Crawford that he wanted to be immediately informed if he saw Schadle sleeping there. Black testified that Williams told her a few weeks before Schadle's discharge that there were rumors that Schadle had been sleeping among the cartons. Black denied being instructed to look for Schadle in the carton area.

Production employees on the day shift get a break from 9 until 9:10 a.m. Crawford testified that on January 13, 3 or 4 minutes after the break was over he reported to Black that an employee[16] had told him that Schadle was "probably in the back asleep . . . in the back in the cartoning two or three tiers back from the rear of the building." Black responded that she would check into it.

Black testified that upon receiving Crawford's report she first looked around to see if she could find Williams. She failed to find Williams, so she went back to the storage area "to see if I could find John." Black testified that she first went to the area of an overhead door on the east wall of the plant. She first went one way looking for Schadle and did not find him. Further testifying, Black stated:

> [A]nd, I didn't see John, so I went back to the [overhead] door and started from that area over and then I seen John . . . he was lying in behind on stack of cartoning—about 3 foot high. . . . I was standing on top of stack of cartoning that was maybe 3-1/2 or 4 foot high, slightly to the left and sighted John . . . he was lying down, with his head against the cartoning, his feet propped up against the wall.

Black further testified that Schadle was lying on his left side with head supported from beneath with his palm on his face and the top of his head against a stack of cartons. She further testified that Schadle was not visible to someone walking in the aisle made by the movement of the cartons because "there was too much cardboard in the way." She stood on a stack of cartoning observing Schadle in this position, with his eyes closed, "maybe 35 or 40 seconds." She did not say anything to Schadle.

[16] On direct examination Crawford identified the employee as Larry Pauley, Schadle's cocustodian. Pauley was not called to testify by either party.

Black testified that after she so observed Schadle she went back to her department in another attempt to find Williams. She was again unable to do so and went to the telephone to call Britain to whom she described what she had observed and where.

Schadle testified that he had had a severe cold and had been groggy, possibly from certain medication he had taken. He sat down on a stack of cartons in front of which was an unobstructed view from the length of the storage area. He further testified that he sat down for no more than 3 minutes, just enough time to blow his nose. He stated that he saw Black climbing on a stack of cartons. When asked on direct examination at what point he saw Black, Schadle testified:

> I can't quote you an exact time. It was at the time when I was sitting there. She came back and got up and looked at some cardboard. She checked some numbers on them to make sure there was still enough supply to do what boxes. She's an assistant foreman in assembly. She has to keep track of the cartoning and—to make sure they have enough cartoning for packaging the boxes.
>
> . . . .
>
> She came back off from assembly and to the cardboard storage area, proceeded past from where I was sitting, climbed up on a stack of cardboard and acted like she was—I don't know I guess she was looking at the numbers of them or counting the stacks. I really have no idea what she was doing. She was looking it over. She climbed back down off the stack she was on and proceeded to go down a different aisleway towards where the maintenance cage and general production areas is.

At that point Schadle testified he got up and went to his sweeping. (About 9:25 a.m. he saw Beal and Britain walk through the carton storage area; perfunctory greetings were exchanged, but nothing else was said.) Schadle agrees that there was nothing said between him and Black. Black testified that it is not part of her job to check numbers on carton stacks.

In all respects that they differ, I credit Black over Schadle. As I stated at the hearing, there was "no palpable[17] reason to discredit Ms. Black." There is no inconsistency in any of her statements which would cause me to discredit her. Moreover, Black appeared to be an unaffected, unassuming individual of simple speech which included no trace of embellishment in her account of the facts. I am convinced that she told the truth. Conversely, when testifying about his discharge Schadle did not have an impressive demeanor and his testimony bears what I consider to be a fatal inconsistency: he acknowledged Black climbed on cartons, but could offer no plausible reason for her to have done so if, as he described, there was an open aisleway in front of him as he "sat" down. As quoted above Schadle first testified, in detail, that checking the numbers of cartons was part of her job and was precisely what Black was doing when he observed her, although he immediately withdrew this assertion and stated that he did not know why she was climbing up on the cartons.[18] Black credibly testified that the only reason she climbed up on the cartons was that Schadle was surrounded by the various stacks of cartoning and this was the only way she could see him, unless she squeezed through a 10-inch opening between two of the stacks of bails which surrounded Schadle. Respondent introduced photographs of the area taken within hours after Black observed Schadle. Black credibly testified that the photographs accurately depicted the area in which she found Schadle. Schadle was called in rebuttal and asked on cross-examination specifically why, if he was sitting on a stack of cartons before which there was an opened aisle, Black would have been climbing on the cartons. Schadle could offer no explanation. I find that the reason Black was climbing on the cartons was that, as she testified, it was the only way she could get an unobstructed view of Schadle.[19] Therefore, I find the General Counsel has failed to prove by a preponderance of the evidence that Schadle was doing anything other than sleeping during the 35 to 40 seconds that Black observed him plus the time that elapsed between Crawford's report to Black and Black's finding Schadle, a period of at least 5 minutes.

After Black called Britain, Britain and Beal went to the storage area. By the time they got there, Schadle was sweeping again. Shortly before the 11:30 lunchbreak, Eary told Schadle to go to Britain's office. When he got there he was met by Britain, Bellis, Black, and Eary. Only Black and Schadle testified about the meeting. I find from the credible testimony of both:

Britain told Schadle that Black had observed him that day at 9:20 a.m. sleeping in the cardboard storage area. Schadle responded that since break was from 9 to 9:10 a.m. and since Britain was there at 9:25 he could not even have had time to take a nap. Black responded that he gave the appearance of sleeping.[20] Britain stated that Black was an agent of the Company and they would have to take her word for it. Schadle asked if his passing out union cards had anything to do with the accusation, and he further stated that he felt Respondent had "been after me" for about 6 months. Beal denied that the union activity had anything to do with the action. Schadle insisted that at most he sat down to blow his nose because he was not feeling very well and that he had seen Black

[17] The record, p. 1326, ll. 17 and 18, is accordingly corrected.

[18] I believe Schadle did this because his venture that Black was climbing on the cartons to inspect numbers was an attempt to explain why she would have been climbing at all. He apparently sensed after he said it that number-checking activity would not withstand scrutiny as an explanation for Black's being up there. Upon such realization, he retracted his theory and testified that he did not know why Black would have climbed on a stack of cartons.

[19] While Black did acknowledge there was a 10-inch space between two of the stacks of cartons surrounding Schadle, this is not the fatal inconsistency in her testimony that the General Counsel argues. Whether Black could have squeezed through the opening or not, she did not. The issue is whether Schadle secreted himself, as Black testified, or whether he just sat down to blow his nose in an open and obvious place. Assuming there was a 10-inch opening between two of the stacks surrounding Schadle, he still had secreted himself from view of casual passers-by.

[20] Contrary to the argument of the General Counsel I find no inconsistency or change of the allegation against Schadle in Black's saying, in effect, that if Schadle actually was not sleeping, he certainly appeared to be.

when she was in the area. Black replied, "You don't know where I was at, John." Schadle replied, "You were standing right next to me." Britain asked Schadle if he had told his foreman that he had been sick and Schadle replied that he had not because it would not have done any good.

Britain told Schadle that he was suspended pending further investigation and that Schadle should call Respondent within a week to find out the disposition of the matter. On the following day, Britain called Schadle and asked him to return to the plant. At a meeting that afternoon (January 14) Britain, Bellis, Eary, Black, Schadle, and Tom Rayburn, a security officer of Respondent, were in attendance. Schadle testified that Britain read from a prepared statement; it was not placed in evidence. Britain announced that Schadle was being discharged on the basis of the accusation by Black. Britain and Schadle argued the matter again, essentially repeating the statements they had made the day before. In addition, Schadle stated that it was "very unfair and that I was contemplating taking legal action." Schadle further asked rhetorically, "[D]o you realize that you have only one witness?"[21]

Respondent's Investigation and Evidence of Disparate Treatment

Thomas Rayburn, Respondent's employment manager whose office is located in Savannah, Ohio, was called by Plant Manager Britain the morning of January 13 and told that Black had found Schadle sleeping. According to Rayburn he told Britain "to get with Mr. Schadle and get his version of the story and suspend Mr. Schadle pending our investigation." Rayburn then called his superior Howard Christiansen who had recently been made manager of industrial relations. Christiansen told Rayburn to go to Georgetown to investigate the matter. Rayburn then went to the Georgetown facility and spoke to Williams, Black, Britain, Bellis, and employee Larry Pauley, but not Schadle who, by that time, had left the plant. He took photographs of the area where Black found Schadle. Rayburn testified that after reviewing the things he learned from his investigation he concluded that "Mr. Schadle had intentionally gone on back in the building in a secluded place where we do keep the cardboard and curled up and went to sleep out of the way." When asked on what he based his conclusion, Rayburn replied that he believed Black. On the morning of January 14 Rayburn called Christiansen and reported his findings. Rayburn testified that:

> Mr. Christiansen did ask me what was our past practice and policy was dealing with people found sleeping on a job and I did tell him that it was past practice to discharge anyone found on the job [sleeping,] however, this was the first incident that had occurred at Georgetown.

Christiansen told Rayburn to go to Georgetown and discharge Schadle.

Rayburn's information to Christiansen that no employee had been found sleeping at Georgetown was erroneous. On March 21, 1979, security guard Richard L. Newman was suspended for a period of 2 days for dozing off while waiting to open a plant gate for the first shift. A supervisor found him and reported it to Respondent's security personnel. Rayburn credibly testified that, although he was employed by Respondent at the time, he had no knowledge of the Newman discipline and neither had Britain nor Bellis told him about it if they knew.[22] Respondent submitted evidence of other employees being discharged for sleeping at its other facilities, to wit: employee Burns on January 6, 1981, at the Sabina facility; employee Fredrick on November 12, 1979, at Sabina; employee Baker on December 5, 1977, at Sabina; employee Gray on March 28, 1977, at Sabina; and employee Thompson on October 2, 1974, at Sabina.

The General Counsel argues that Respondent's discharge of Schadle for sleeping, while Newman was suspended for only 2 days, proves a case of discriminatory treatment. I disagree. In the first place there is no evidence that Christiansen, who made the decision to discharge Schadle, or any other supervisor involved in the Schadle discharge,[23] knew that one employee had received discipline less than a discharge. In fact, Christiansen was told, albeit erroneously, by Rayburn that no other employees at Georgetown had been caught sleeping. Second, Walter Hockett, Respondent's chief of security, who made the decision to suspend Newman, credibly testified that he viewed as less serious Newman's case because Newman had almost completed an entire shift and had simply dozed off sitting up in a straight chair at a time and place where he was certain to be discovered by personnel reporting to the first shift. Thus, Hockett contrasted Newman's case from other guards[24] who were discharged because they had "deliberately" slept on duty.[25] Finally, Respondent's making one exception to its policy of discharging sleeping employees does not make out a case of disparate treatment of Schadle. In *PPG Industries*, 251 NLRB 1146 (1980), employee and union activist Bedsole was discharged after being discovered, as was Schadle, sleeping in a prone position in a "secluded place." In approving the administrative law judge's decision, the Board, at fn. 1, stated, in part:

> In fact, the record contains only one example of an employee who slept on a job in circumstances resembling Bedsole's and was not discharged. The evidence also shows, however, that Respondent terminated 34 employees in the past 10 years for sleeping on the job. In view of Respondent's record in this area and the seriousness of Bedsole's miscon-

[21] Credible testimony of Black and Rayburn.

[22] According to an exhibit submitted after the hearing without objection from the General Counsel, Britain was not assigned to the Georgetown plant until April 16, 1979.

[23] Although Eary was a supervisor of maintenance and security in January 1981, and was a security officer prior to that date, there is no evidence that he was a supervisor at the time of, or knew of, the Newman incident.

[24] Burns, Baker, and Gray.

[25] This included one who was discovered with a pillow and alarm clock.

> duct, we find that its decision to reprimand, rather than discharge, one other employee for sleeping on worktime does not establish that it treated Bedsole in a disparate manner.

Therefore, assuming that Schadle's conduct could be equated with Newman's, one case of different disposition does not make out a case of disparate treatment.

Conclusion on Schadle's Discharge

Knowledge of Schadle's union activities is not denied. Animus toward those activities is proven by the many supervisory statements found herein that Schadle was being watched because of those activities. It is therefore clear that the General Counsel has presented a prima facie case of unlawful discharge. Therefore, Respondent bears the burden of proving that Schadle would have been discharged even absent his union activities against which it bore animus.[26]

I find and conclude that Respondent has met that burden. Schadle had told at least one other employee, Crawford, that he had napped in stacks of cartons. He admitted "joking" about nap-taking to other employees. Schadle's actual or jested practice about sleeping among the cartons reached management. When Crawford reported to Black that an instance of the "rumored" sleeping practice of Schadle was then taking place, Black investigated immediately. She found Schadle secreted among the stacks of folded cartons asleep, or apparently asleep, in a prone position. She reported it to higher management, which discharged him on the basis of Black's report, and there is insufficient evidence of disparate treatment to prove that the action would have been anything other than discharge even absent union activity by Schadle.

There is not the slightest doubt in my mind that Respondent was looking for a reason to discharge Schadle.[27] But there is also no doubt in my mind that Schadle handed Respondent a reason to discharge him. As stated in *Klate Holt*, 161 NLRB 1606, 1612 (1966):

> The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

Accordingly, I shall recommend the allegations that Schadle was discharged for union or other protected concerted activities be dismissed.

Settlement

In November 1981, Schadle, Respondent, and the General Counsel reached a settlement agreement providing for the posting of a notice and the payment of $13,000 to Schadle. But the settlement did not provide for reinstatement. Before the settlement agreement was approved by the Regional Director, Christiansen gave a speech to the employees. Apparently on the basis of this speech, the Regional Director refused to approve the settlement agreement and this entire matter was brought to trial. The text of the speech delivered on November 17 and 18 is as follows:

> I asked to meet with you because I wanted to announce that the John Schadle matter has been resolved in a manner that the company and I are very satisfied with.
>
> We fired Mr. Schadle because he took advantage of the company and in our opinion his fellow employees. The Labor Board wanted us to reinstate Mr. Schadle. As a result of the resolution Mr. Schadle will *never* again work in this plant or any other Mac Tools facility. The Labor Board also sought to prove that we violated the law. We did not violate any law and as a result of the resolution we have not and will not admit that we did.
>
> These are the two (2) important parts of this case. We insisted on and won these two (2) points. However, every resolution is a compromise, and there is a downside to this resolution. We have paid Schadle $13,000.00 as part of this resolution, a sum less than one (1) year's wages. We naturally would have preferred to give Mr. Schadle nothing.
>
> Some of you may question why we gave Mr. Schadle anything if we were convinced we were right. I asked myself the same question. I am the one who made the decision to discharge John Schadle. I discharged him for sleeping and I know that there is no law against discharging an employee who sleeps on the job. So I really was hesitant to give Mr. Schadle any money. But Mac Tools is a business and I made a business decision. If we continued to litigate this case, the company would have had to spend much more money in litigation costs than what we gave Schadle. The two (2) things I could never have agreed to were, to permit Mr. Schadle to work for Mac Tools, or to admit Mac Tools did something wrong in this discharge. We won on those points.
>
> And although the $13,000.00 paid to Schadle may seem like a large amount of money, it really is not. Less than one (1) year's wages to a person with no employment opportunity at Mac and very little future employment opportunity in the area, is really a small amount of money.
>
> I think that Mac Tools is a good place to work. In fact, I think this is the best place to work in this

[26] *Wright Line*, 251 NLRB 1083 (1980).

[27] And there is also not the slightest doubt in my mind that Black knew Respondent was looking for a reason to discharge Schadle, whether instructed to look for him among the cartons or not. When Black could not find Williams she did not call or attempt to call Britain or any other supervisor who had authority over Schadle. She attended to the matter herself, and fast. She did so, I believe, because she knew Respondent wanted a reliable witness, which she was, to catch Schadle committing a dischargeable offense.

> area. Every day, we receive new job applications which we add to the three thousand applications we have on file. This company will continue to grow. Our future is bright. You will be a part of our future and will share in our growth. Mr. Schadle will not. To me, this is the thing that matters.

After he gave the prepared speech Christiansen entertained questions. The General Counsel produced two witnesses to testify regarding these questions, Howland and Rickey. Both Howland and Rickey stated that Christiansen was asked by an employee what kind of reference Schadle would get. Both Howland and Rickey testified that Christiansen stated that Schadle would get a "neutral" reference. Howland added that Christiansen stated that a good employee would also get a statement of "anything they did outstanding of the Company, but that [Schadle] would never receive one of these recommendations." Rickey included no such statement as quoted to by Howland and Christiansen credibly denied that any such statement was made.

The complaint alleges:

> On November 17 and 18, 1981, Respondent, acting through Howard Christiansen at its Georgetown, Ohio facility:
>
> (i) Informed employees that it was futile to seek remedies through Board processes.
>
> (ii) Impliedly threatened to blackball and/or give poor work performance references to employees who engaged in union activities and/or processed charges with the Board.

In her brief the General Counsel relies solely on the quoted text of the prepared speech, apparently abandoning any contention that the testimony of Rickey and Howland support the quoted allegations. In her brief the General Counsel argues that the speech is "indicative of Respondent's continuing hostility towards Schadle and his above-mentioned protected activities."[28] The General Counsel further argues that the speech in its entirety is one which would convey to the employees the impression that seeking Board remedies is futile because it stressed the fact that Schadle would never work for Respondent again and that the $13,000 would not last Schadle very long.

Assuming that the speech was indicative of hostility towards Schadle, this still does not, ipso facto, establish a violation of Section 8(a)(1). Also, the employees are hardly told that seeking Board remedy is futile. If anything, they are told that Schadle was to receive a great deal of money because he had invoked Board processes. Finally, there is nothing in the speech which conveys a threat to "blackball" Schadle or do anything else to Schadle vis-a-vis his employment prospects with other employers. Finally, after settlement of an NLRB case, Respondent has a right to refuse future employment to employees who waive reinstatement therein, as did Schadle.[29] At most, Christiansen was telling the employees that Respondent would invoke this right.

Accordingly, I shall recommend that this allegation of the complaint be dismissed.

[28] G.C. Br., p. 12.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent Mac Tools, Inc. set forth above occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(1) of the Act by:

(a) Soliciting grievances from employees and promising adjustment of such grievances in order to discourage employees' support of the Union.

(b) Creating an impression among employees that their union activities were under surveillance.

(c) Informing employees that they are being watched by Respondent in order to discourage their union activities.

4. Respondent has not otherwise violated the Act.
5. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.[30]

ORDER

The Respondent, Mac Tools, Inc., Georgetown, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from employees and promising adjustment of such grievances in order to discourage employees' support for the Union.

(b) Creating an impression among employees that their union activities were under surveillance by Respondent.

[29] See NLRB Gen. Counsel Adm. Ruling, No. SR-967 (1960), 47 LRRM 1038.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Informing employees that they are being watched by Respondent in order to discourage their union activities.

(d) In any like or related manner interfering with, restraining, or coerceing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Post at its Georgetown, Ohio facility, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the allegations in the complaint of violations of Section 8(a)(1) and (3) of the Act be dismissed except insofar as specific violations of Section 8(a)(1) are hereinabove found.

[31] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."